

1988

Albert John v. David Okubo : Brief of Respondent

Utah Court of Appeals

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David L. Grindstaff; attorney for appellants.

David W. Slagle; Snow, Christensen and Martineau; Gary D. Stott; Michale A. Peterson; Richard, Brandt, Miller and Nelson; R. Scott Williams; Strong and Hanni.

Recommended Citation

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

ALBERT JOHN and ANGELA
BUTTERFIELD, as guardians and
parents of and on behalf of
TIFFANY RUTH BUTTERFIELD,

*
* DC C86-9250
*
* CA 880347-CA
* [Priority 14(b)]

Plaintiffs/Appellants, *
*

VS. *

VS. *

DAVID OKUBO, THOMAS NICKOL, *
and HOLY CROSS JORDAN VALLEY *
HOSPITAL, JOHN DOES 1-5, *
*

Defendants/Respondents. *

BRIEF OF RESPONDENT
HOLY CROSS JORDAN
VALLEY HOSPITAL

Appeal from a Summary Judgment Dismissal of a Medical
Malpractice Claim in the Third District Court
Salt Lake County, State of Utah
The Honorable Richard H. Moffat, Presiding

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DAVID OKUBO, THOMAS NICHOL,
and HOLY CROSS JORDAN VALLEY
HOSPITAL, JOHN DOES 1-5,

Defendants/Respondents.

BRIEF OF RESPONDENT
HOLY CROSS JORDAN
VALLEY HOSPITAL

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Although there may be other issues that relate to the co-defendants, the only issues which the appellants raise as to Holy Cross Jordan Valley Hospital are:

(1) Whether the emergency room nurses took an adequate history and whether the medical record was properly brought to the attention of the attending physician;

(2) Whether the acts or omissions of the hospital employees were a proximate cause of the

death of Tiffany Ruth Butterfield;

(3) Whether the hospital could engage in "the practice of medicine;" and

(4) Whether the Court properly denied the plaintiffs a continuance of the trial date so they could engage in further discovery.

STATEMENT OF THE CASE

This is an action for medical malpractice brought by plaintiffs/appellants Albert John Butterfield and Angela Butterfield against Dr. David Okubo, Dr. Thomas Nichol, and Holy Cross Jordan Valley Hospital. Although the title of the pleading purports to list the plaintiffs as guardians of Tiffany Ruth Butterfield, Tiffany Ruth Butterfield is deceased and the claims are in the nature of a wrongful death action.

The defendants/respondents moved for Summary Judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure, claiming that the plaintiffs/appellants did not have sufficient proof, either through expert medical opinions or otherwise, to prove a violation of the standard of care by the health care providers and to prove proximate cause. Following the submission of legal memoranda and oral argument to the District Court, the Honorable Richard H. Moffat granted the Motions of all three defendants/respondents and entered Summary Judgment by Order dated January 27, 1988.

STATEMENT OF FACTS

The Statement of Facts contained in the Brief of the co-

defendant/respondent Nichols is accurate and complete as it relates to the care and treatment rendered to Tiffany Butterfield, and this defendant/respondent adopts that Statement of Facts.

The only issue as to discovery as it relates to this defendant/respondent concerns Answers to plaintiffs' Interrogatories. The Interrogatories were served on September 10, 1987, and Answers were timely filed on October 5, 1987. There were no complaints about the Answers until a court hearing before Judge Moffat on December 23, 1987. At that time, the attorney for plaintiffs/appellants complained that the Answers were vague and unresponsive (R. at 212).

SUMMARY OF ARGUMENT

The only issue posed by appellants' appeal with regard to Holy Cross Jordan Valley Hospital is whether certain records should have been presented to Dr. Nickol before he examined Tiffany Butterfield on August 16, 1984, which was the second emergency room visit. (Appellants' Brief, p. 4.) Appellants also make a claim that "physician records indicate an inadequate record was presented to the attending physician by the hospital employees." (Appellants' Brief, p. 4.) The full text of the hospital record is set forth in Addendums "D" and "E" to Nickol's Brief on Appeal. Holy Cross Jordan Valley Hospital contends that the records are complete and accurate and did not in any way cause or contribute to the death of Tiffany Butterfield.

The appellants' Brief does not really address the issue of whether the claimed acts and/or omissions of defendants/ respondents was a proximate cause of the death of Tiffany Butterfield. Since this was an issue raised before the trial court, and a specific finding was made that there was no proximate cause, this issue will be briefly addressed in this Brief. It is the contention of Holy Cross Jordan Valley Hospital that the omissions claimed by the plaintiffs/ appellants are so remote, and because of intervening acts of other health care providers, the Court's ruling concerning proximate cause was proper.

Another issue which was not addressed by the appellants in their Brief is whether Holy Cross Jordan Valley Hospital can be found liable for practicing medicine. The trial judge specifically ruled that a hospital could not practice medicine as defined by statute.

The other issue raised by the appellants concerns the Court's denial of the Motion to Allow Additional Discovery. Holy Cross Jordan Valley Hospital responded to plaintiffs' Interrogatories well within the discovery period allowed by the Utah Rules of Civil Procedure and within the date set by the Court at the pretrial scheduling conference. The appellants

did not raise any issue as to the adequacy or inadequacy of the Answers to Interrogatories until the hearing on defendants' Motion for Summary Judgment. Although this defendant/respondent contends that its Answers are full and complete, if the plaintiffs/appellants were not happy with the response, the appropriate remedy was a Motion to Compel pursuant to Rule 37, Utah Rules of Civil Procedure.

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFFS HAD FAILED TO PRODUCE EXPERT TESTIMONY NECESSARY TO PROVE THEIR MEDICAL MALPRACTICE CLAIMS.

The only conceivable claim that could possibly be made against Holy Cross Jordan Valley Hospital is vaguely stated in the Affidavit of H. Barry Jacobs. The Affidavit contends, in paragraph 4, that all three defendants were negligent and that the specifics are explained in the following paragraphs:

In paragraph 5 of Jacobs' deposition he contends that the hospital nursing staff failed to detail observations of the parents. Similarly, the same allegation is made in paragraph 7 concerning the hospital visit of August 16, 1984. It is difficult for this respondent to make a legal argument to the claim because the Affidavit is so clearly erroneous. All one has to do is look at the emergency room records for September 4, 1984, and August 16, 1984, to determine that the Jacobs Affidavit is in error.

The admitting history on the July 4, 1984, record indicates "problems breathing." A full and complete examination and evaluation is done by Dr. Tom Nickol. He carefully records the subjective complaints, his objective findings, his assessment, and his plan of action.

The August 16, 1984, nursing care record clearly shows that the nurses noted the parents' complaint that the child had stopped breathing for four seconds and that the mother was concerned. Again, Dr. Nickol made a careful and complete examination of the child and noted all of the relevant data concerning the subjective complaints and his objective findings.

In order for a plaintiff to prevail in a medical malpractice claim, the plaintiff must provide expert medical testimony to establish the requisite standard of care and a breach of that standard. See, e.g., Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980); Marsh v. Pemberton, 10 Utah 2d 40, 347 P.2d 1108 (1959). Without such testimony, a health care provider is entitled to summary judgment. See, Robinson v. Intermountain Health Care, Inc., 740 P.2d 262 (Utah App. 1987); Hoopiiania v. Intermountain Health Care, Inc., 740 P.2d 270 (Utah App. 1987).

The Jacobs Affidavit which is attached to appellants' Brief purports to claim that Dr. Jacobs is familiar with the standard of care, applicable in 1984, required in pediatrics, emergency room medicine, as well as hospital responsibility for adequate record keeping and availability of previous records. (See paragraph 3, Jacobs Affidavit.) Holy Cross Jordan Valley Hospital claims,

however, that the Affidavit is insufficient to qualify Dr. Jacobs as a specialist in the area of nursing care and, as a result, Dr. Jacobs is not qualified to render an opinion with regard to the standard of care for the hospital. The Utah Supreme Court has specifically recognized that a practitioner of one school of medicine is not competent to testify as an expert against other practitioners in other specialties. Burton v. Youngblood, 711 P.2d 245 (1984). Clearly, Dr. Jacobs is not a nurse, is not an emergency room physician, and is not qualified to render an opinion as to the adequacy of the record keeping of Holy Cross Jordan Valley Hospital. All one has to do is look at the record itself to determine that the opinions that he rendered in his Affidavit are spurious.

POINT II.

THE TRIAL COURT PROPERLY DETERMINED THAT THE ACTS OR OMISSIONS, IF ANY, OF HOLY CROSS JORDAN VALLEY HOSPITAL WERE NOT THE PROXIMATE CAUSE OF TIFFANY BUTTERFIELD'S DEATH AS A MATTER OF LAW.

The plaintiffs/appellants have not specifically raised the issue of proximate cause as to Holy Cross Jordan Valley Hospital. The Court, however, made a specific finding in its Order and Summary Judgment that the "alleged misconduct" on the part of all of the respective defendants was not a proximate cause of the death of Tiffany Butterfield. The arguments concerning proximate cause are clearly and succinctly set forth in the Brief of respondent Nickol on pages 27-30. The same argument and logic applies with regard to Holy Cross Jordan Valley Hospital. Further, the alleged proximate cause as to this respondent is

even one step further removed. Plaintiffs somehow contend that the nursing staff did not take an adequate history from the parents when they presented with their child at the emergency room. They then argue that if the history had been presented to the doctor, he would have somehow acted differently and then prevented the death of Tiffany Butterfield. The argument, however, defies all logic. Dr. Nickol, by his own admission and as is reflected in the emergency room records, took a full and complete history from the parents themselves and then did a thorough and complete examination on his own. He did not testify in his deposition, nor was there any evidence from any other source that Dr. Nickol would have acted differently had any other history been given to him by the nurses. In fact, the history as recorded on the emergency room records was full and complete and allowed a full and thorough response and plan of action by Dr. Nickol.

POINT III.

THE HOSPITAL CANNOT, AS A MATTER OF LAW, RENDER
PHYSICIAN SERVICES TO PATIENTS.

The plaintiffs/respondents did not raise an issue which was decided by the trial court below: That Holy Cross Jordan Valley Hospital is not liable to plaintiffs/respondents as a matter of law inasmuch as hospital employees involved in this case cannot practice medicine and are not held to the standard required of individual practicing physicians. Said finding was specifically made in paragraph 2 of the Court's Order and Summary Judgments.

The Utah Code makes it unlawful for anyone other than a licensed physician to engage in the practice of medicine, which is defined in part as "to diagnose, treat, correct, advise or prescribe for any human disease, ailment or deformities" UTAH CODE ANN., §58-12-28(4) (a). "Diagnose" is defined as "to determine the source, nature, kind or extent of a disease or other physical or mental condition" UTAH CODE ANN., §58-12-28(2).

The primary case in point is a recent decision from the United States District Court for the District of Utah, Central Division, in which the Honorable J. Thomas Greene found that there was no proper basis in plaintiff's pleadings to hold the LDS Hospital liable for the alleged wrongful acts of private physicians. Thus, in Tolman v. IHC Hospitals, Inc., 627 F.Supp. 682 (Utah 1986), the Court addressed the issue of whether the hospital could be sued for the acts of physicians because of the claimed negligence in the practice of medicine on a theory of agency. Judge Greene carefully reviewed cases from other jurisdictions and attempted to arrive at a determination of what he believed the outcome would be if the case were decided by the Supreme Court of Utah. On page 683 of the opinion, the Court held that the hospital would not be liable for the alleged wrongful acts of misdiagnosing the plaintiff's condition because that constituted a part of the practice of medicine by the physicians in question.

POINT IV.

THE COURT PROPERLY DENIED PLAINTIFFS' MOTION TO
EXTEND DISCOVERY AND TO CONTINUE THE TRIAL DATE.

A pretrial scheduling conference was held by all counsel and by the trial judge on August 25, 1987, and as a result a scheduling order issued which mandated that all discovery, including the filing of depositions, be completed by December 11, 1987. On September 10, 1987, the plaintiffs' attorney served Interrogatories on this respondent. Those Interrogatories were fully and completely answered on October 5, 1987, which was well within the 30 day time limit provided by Rule 33, Utah Rules of Civil Procedure. A copy of those Answers is attached to this Brief as Addendum "A." At the time of the first hearing on defendants' Motions for Summary Judgment, the plaintiffs' attorney filed a Motion to Enlarge Time To Complete a Discovery, a copy of which is attached hereto as Addendum "B." It was not until after December 23, 1987, that plaintiffs' attorney filed a Motion for an Order Compelling Discovery, a copy of which is attached as Addendum "C." On approximately December 28, 1987, plaintiffs' attorney served defense counsel with a Memorandum of Law in Support of Motion for an Order Compelling Discovery, a copy of which is attached hereto as Addendum "D."

The contentions of plaintiffs are clearly without merit. Not only was the Motion not made timely, it is not well-taken. Even a cursory review of the Answers of defendant Holy Cross Jordan Valley Hospital show that the Answers are full, complete, and in accordance with Rule 26, Utah Rules of Civil Procedure.

The plaintiffs/appellants have cited no Utah cases in support of their contention that the decision by Judge Moffat was erroneous. Clearly, discovery matters are discretionary with the trial judge and subject to reversal on appeal only upon a showing of abuse of discretion. See, e.g., Warden v. Drenk Walter, 700 P.2d 150 (Mont. 1985); DeTevis v. Aragon, 727 P.2d 558 (N.M. App. 1986). The trial court was clearly within its discretion in denying plaintiffs' Motion to Enlarge Time for Discovery and in denying plaintiffs' Motion to Compel further Answers to Interrogatories. The plaintiffs had adequate and sufficient time to complete discovery from the date of filing their lawsuit up through the scheduled date of completion of discovery. In fact, plaintiffs' counsel agreed to the discovery cutoff date and should not now be heard to complain.

CONCLUSION

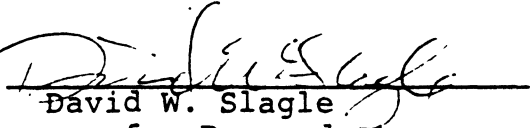
The trial court's Summary Judgment dismissal of plaintiffs' Complaint should be upheld as to respondent Holy Cross Jordan Valley Hospital. Clearly, the plaintiffs could not prevail at trial because of their failure to procure competent expert medical testimony as to the standard of care of nurses. Further, the plaintiffs did not and could not produce expert medical testimony as to proximate cause. The Court properly found that the hospital did not and could not practice medicine as alleged by the plaintiffs in their Complaint. Finally, the Motion of the plaintiffs asking for additional time to complete discovery and

to compel this respondent to further respond to Interrogatories was improper, untimely and without adequate basis in fact.

Respectfully submitted this 14 day of October, 1988.

SNOW, CHRISTENSEN & MARTINEAU

By


David W. Slagle

Attorney for Respondent
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

ALBERT JOHN and ANGELA
BUTTERFIELD, as guardians and
parents of and on behalf of
TIFFANY RUTH BUTTERFIELD,

Plaintiffs,

vs.

DAVID OKUBO, THOMAS NICHOL,
and HOLY CROSS JORDAN VALLEY
HOSPITAL, JOHN DOES 1-5,

Defendants.

DEFENDANT HOLY CROSS JORDAN
VALLEY HOSPITAL'S ANSWERS TO
PLAINTIFF'S FIRST SET OF
INTERROGATORIES

Civil No. 86-9250

Hon. Richard Moffat

In accordance with the provisions of the Utah Rules of
Civil Procedure, defendant, Holy Cross Jordan Valley Hospital,
by and through its attorneys, answers plaintiffs' First Set of
Interrogatories as follows:

1. What is your full name, corporate name, and address.

ANSWER: Holy Cross Jordan Valley Hospital is a wholly-
owned subsidiary of Holy Cross Health Systems.

ADDENDUM "A"

2. What is your job function and any specific duties you preform?

ANSWER: Defendant objects to this Interrogatory as overly broad, vague and nonsensical.

3. On the date of July 4, 1984 were you doing business as Holy Cross Jordan Valley Hospital?

ANSWER: Yes.

4. On the date of August 16, 1984 were you doing business as Holy Cross Jordan Valley Hospital?

ANSWER: Yes.

5. On the date of October 4, 1984 were you doing business as Holy Cross Jordan Valley Hospital?

ANSWER: Yes.

6. On the date of July 16, 1984 were you doing business as Holy Cross Jordan Valley Hospital?

ANSWER: Yes.

7. If yes,

(a) Which of the above dates was defendant David Okubo on duty as your employee, and what specific hours did he work on each of the named days?

(b) Which of the above dates was defendant Thomas Nichol on duty as your employee, and what specific hours did he work on each of the named days?

ANSWER: There are no such employees of this answering defendant.

8. Did you have any contact with the deceased Tiffany Ruth Butterfield on any of the dates above listed in 3. through 6.?

ANSWER: Yes. Tiffany was seen in the Emergency Room on July 4, 1984 and August 16, 1984.

9. If yes, state specifically and in detail, as accurately as your employees can remember, the exact sequence of events that occurred subsequent to the initial encounter or contact with the deceased Tiffany Ruth Butterfield on each of the days above mentioned in 3. through 6.

ANSWER: This defendant believes an adequate response may be found in the patient's medical records and directs plaintiffs' attention there, according to Rule 33(c) of the Utah Rules of Civil Procedure.

10. Was the deceased Tiffany Ruth Butterfield examined by any of your employees on the above named dates, 3. through 6.?

ANSWER: See answer to preceding Interrogatory.

11. If yes, were other persons involved in the examinations, or witness thereto?

ANSWER: The Emergency Room staff scheduled at Holy Cross Jordan Valley Hospital on the two dates for which there is documentation Tiffany was brought to the hospital include:

July 4, 1984:	3-11	Patty Conder, R.N.
	3-11	Linda Aldrich, R.N.
	11-7	Janice Peummer, R.N.

August 16, 1984: 3-11 Niel Wilcox, R.N.
 3-11 Jean Gardener, R.N.
 11-7 Patty Conder, R.N.

12. Was any written report made of the details of any examinations performed on these dates?

ANSWER: In addition to the medical records, the emergency room logs note "Tiffany Butterfield" on July 4 and August 16, 1984 only.

13. If yes, state:

(a) The name, title, and present address of the person or persons who prepared each report.

(b) The name, title, and present address of the person or persons for whom each such report was prepared;

(c) The date, time, and place where each such report was prepared;

(d) The name, title and present address of the person or persons who are the present custodian(s) of each such report.

ANSWER: Unknown at the present time.

14. If the answer to interrogatory 12. above is yes, was each report written or reduced to writing?

ANSWER: Yes.

15. If yes, attach a copy of each such report to your answers to these Interrogatories.

ANSWER: See Answer to Interrogatory No. 9.

16. State the name and address or otherwise identify and locate any person or persons who, to your knowledge, or to the knowledge of your employees, agents or attorneys, purport to have knowledge of facts relevant to the conduct described in these interrogatories.

ANSWER: None other than names in the medical records of Tiffany Butterfield.

17. Do you, your attorneys, or any person employed by you or your attorneys, have possession or know of the existence of any books, records, reports made in the ordinary course of business, or other printed or documentary material or photographs, drawings, or documents, or other tangible objects that are relevant to any of the conduct described in these interrogatories?

ANSWER: See Answer to Interrogatory No. 16.

18. If yes, state:

- (a) The name and description of each such item;
- (b) The name and address of each person who made, prepared or caused to be made, each such item;
- (c) The name and address of the present custodian of each such item;
- (d) The date, time and place where each such item was made, prepared or taken;
- (e) The method by and purpose for which each such item was made, prepared or taken;

(f) The manner in which each such item is relevant to the conduct described in these interrogatories.

ANSWER: Not applicable.

19. If the answer to 17 is yes, do you have knowledge of any item mentioned there being altered in any manner, lost or destroyed?

ANSWER: No.

20. State the names and current addresses of all physicians, surgeons, nurses, physical therapists or other employees of Holy Cross Jordan Valley Hospital, who provided any treatment or examination of the deceased Tiffany Ruth Butterfield during the period from birth until her death.

(a) The name and current addresses of each practitioner.

(b) The dates of all such examinations or treatments.

(c) The name and current address of the person in charge of each examination or treatment administered.

ANSWER: See Answers to Interrogatories No. 9, 11, and 16.

21. State the names and addresses of all persons known to the defendant and defendant's counsel, agents, assigns, or representatives to have personally witnessed any of the symptoms of the deceased at any time.

(a) State the date the symptoms were witnessed.

(b) State whether records were made concerning these symptoms.

ANSWER: See Answer to Interrogatory No. 20.

22. State any knowledge of any x-rays, CAT scans or angiograms of the deceased taken during her lifetime.

ANSWER: Not to the knowledge of this answering defendant.

23. If yes, state:

(a) The part(s) of the deceased's body x-rayed, or which were studied.

(b) The time and place that the x-rays, CAT scans or angiograms were taken.

(c) The results, conclusions or diagnoses reached from each.

ANSWER: Not applicable.

24. State the names and addresses of all persons who will, or may be called as witnesses at the trial in this case, also include complete factual material upon which each witness is expected to testify, and a brief summary of his or her expected testimony.

ANSWER: At this time, this defendant has not determined which witnesses will be called at the time of trial.

25. Identify all exhibits which may be introduced at the trial in this case.

ANSWER: At this time, this defendant has not determined which exhibits will be used at the time of trial.

26. Identify each person who will or may be called as an expert witness at trial in this case. And as to each state:

- (a) Present address and telephone number;
- (b) Medical or professional specialty or capacity;
- (c) Educational background and experience including any degrees or certification obtained from any educational, honorary or professional association;
- (d) The date the expert was first contacted;
- (e) The fee arrangement with each expert;
- (f) The date that the expert was first contacted concerning this case;
- (g) The subject matter upon which the expert is expected to testify;
- (h) The substance of the expert's expected testimony;
- (i) Whether the expert examined the deceased, and if so state:
 - (1) The date of each such examination;
 - (2) The identity of any persons present at each examination;
 - (3) The nature and extent of each examination;
 - (4) Whether any written report, tapes or photographs were taken or prepared concerning the examination.
- (j) Whether the expert has previously testified in any prior medical malpractice actions;
- (k) If so, state:

(1) The caption of each such case in which testimony was given, including names of parties, court and court case number(s);

(2) Nature of substance of testimony given;

(3) The name and address of the attorney who procured the testimony.

ANSWER: As of this time, this defendant has not made a determination as to which expert witnesses will be used at trial.

27. List all current or applicable insurance policies that you hold which indemnify you for malpractice suits, also list each policy financial limit and attach copies of the policies to your answers to these interrogatories.

ANSWER: This defendant does not intend to produce the hospital's insurance policies without a court order, but a list of the insurance policies that were in effect during the period from July, 1984 through December, 1984, stating their amounts and policy numbers follows:

1. The Hartford
#36 MHUJG 7040
\$10 million
2. The Federal
#85 7928 0639
\$17 million
3. The Hartford
#36 MXS 081456
\$45 million

4. The Federal
#85 7928 0720
\$10 million

5. The First State
#932 449
\$15 million

Total \$97 million
June 1, 1984 to June 1, 1985

DATED this 5th day of October, 1987.

SNOW, CHRISTENSEN & MARTINEAU

By Elizabeth King Brennan
Elizabeth King Brennan
Attorneys for Defendant Holy
Cross Jordan Valley Hospital

SCMEKB95

AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

SHAUNA JENSEN, being duly sworn, says that she is employed in the law offices of Snow, Christensen & Martineau, attorneys for Defendant Holy Cross Jordan Valley Hospital herein, that she served the attached Answers to Plaintiff's First Set of Interrogatories

_____ (Case No.) 86-9250 _____ upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Scott Williams, Esq.
Attorney for Defendant Nichol
600 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111

David Grindstaff, Esq.
Attorney for Plaintiff
395 South 600 East
Salt Lake City, Utah 84102

Gary D. Stott, Esq.
Attorney for Defendant Okubo
50 South Main #700
Salt Lake City, Utah 84110

and causing the same to be mailed first class, postage prepaid, on the 5th day of October, 1987.

Shauna Jensen
SHAUNA JENSEN

SUBSCRIBED AND SWORN to before me this 5th day of October, 1987.

Rebecca Beeth
NOTARY PUBLIC

My Commission Expires:

4-22-88

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

ALBERT JOHN and ANGELA	:	Civil No. C86-9250
BUTTERFIELD, as natural	:	
guardians of and on behalf	:	
of TIFFANY RUTH BUTTERFIELD,	:	<u>MOTION TO ENLARGE TIME:</u>
	:	
Plaintiffs,	:	<u>TO COMPLETE DISCOVERY</u>
vs.	:	
DAVID OKUBO, THOMAS NICHOL,	:	
and HOLY CROSS JORDAN VALLEY	:	
HOSPITAL, JOHN DOES I - V.,	:	
	:	
Defendants.	:	Hon. Richard Moffat

PLAINTIFF'S in the above entitled action, by and through their counsel hereby move this court to grant an Extension of Time: To Complete Discovery, pursuant to Rule 6(b) R.C.P., U.C.A. And states the following in support thereof:

1. Pursuant to a Scheduling Conference held in this court, discovery was to be completed by December 11, 1987.

2. The defendant's responses to interrogatories, and production of documents is wholly unsatisfactory, necessitating further discovery and a motion to compel in this matter.

THEREFORE plaintiffs by and through their counsel hereby request that the time for obtaining discovery in this matter be enlarged an additional six (6) months in order to have the necessary time to obtain the necessary discovery to limit the genuine issues of material fact which need to be adjudged by this honorable court.

DATED AND SIGNED: December 11, 1987.



DAVID L. GRINDSTAFF,
Attorney for Plaintiff's

CERTIFICATE OF SERVICE


"I hereby certify that I caused copies of the foregoing pleading: Motion to Enlarge Time, to be mailed to attorneys for defendants, at:

Gary D. Stott, Esq.
RICHARDS, BRANDT, MILLER & NELSON
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110

David W. Slagle, Esq.
SNOW, CHRISTENSEN & MARTINEAU
Eleventh Floor, Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

R. Scott Williams, Esq.
STRONG & HANNI
Boston Building, Sixth Floor
#9 Exchange Place
Salt Lake City, Utah 84111

And that I caused these copies to be mailed on this 11 Day of December, 1987,"



DAVID L. GRINDSTAFF

David L. Grindstaff, #4043
Attorney for Plaintiffs
395 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 363-1370

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

ALBERT JOHN AND ANGELA	:	Civil No. C86-9250
BUTTERFIELD, as guardians and	:	
parents of and on behalf of	:	
TIFFANY RUTH BUTTERFIELD,	:	<u>MOTION FOR AN</u>
	:	
Plaintiffs,	:	<u>ORDER COMPELLING</u>
	:	
vs.	:	<u>DISCOVERY</u>
	:	
DAVID OKUBO, THOMAS NICHOL,	:	
and HOLY CROSS JORDAN VALLEY	:	
HOSPITAL, and JOHN DOES I-V.	:	
	:	
Defendants.	:	Honorable Richard Moffat

PLAINTIFF'S in the above action, by and through their counsel, hereby move this court for an Order pursuant to Rule 37(a) of the Utah Rules of Civil Procedure, U.C.A. compelling defendant Holy Cross Jordan Valley Hospital, who failed to fully answer completely or adequately Interrogatories numbered: 1,2,7,8, 9,10,11,17,20,21,23,26, and that the answers given are purposely incomplete and evasive, and properly should be treated as a failure to answer, as per Rule 37(a)(3), R.C.P., U.C.A. (Copy of Interrogatories to defendant Holy Cross Jordan Valley Hospital, and, this defendants Answers are attached herewith.)

Plaintiff's also move this court for an Order compelling defendant named herein to produce for inspection and copying the following documents: (1) The document which shows the causal relationship between the defendant doctors and the defendant Hospital, (2) Medical records of the deceased plaintiff Tiffany Ruth Butterfield, including any photographs and all relevant examinations, (3) All Emergency Room policies and procedures, and records relating to the subject matter of this case, (4) All records of deceased infants, whose demise is attributable to Infant Crib Death Syndrome, or as otherwise identified, within the past seven (7) years.

Plaintiff's also move for an Order pursuant to Rule 37(a)(4) R.C.P., U.C.A. requiring the aforesaid defendant to pay plaintiff's costs of obtaining this Order: In the amount of \$155.00 as reasonable expenses incurred by the wilfull failure to permit discovery: through a failure to answer the above listed Interrogatories, and failure to produce the requested documents, according to Rules 33, and 34 R.C.P., U.C.A. . on the ground that this defendants refusal, had no substantial justification.

Further defendant Holy Cross Jordan Valley Hospital has not filed a timely motion for a protective order in relation to the Interrogatories above listed. And that there is no undue burden, expense, embarrasment, oppression, due to the facts contained herein, and that the unanswered Interrogatories did not contain any privileged information, properly falling under the work product area.

This motion is further based upon the papers and files in this matter and the Memorandum of Law, attached hereto.)

DATED AND SIGNED: December 21, 1987.



DAVID L. GRINDSTAFF,
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

"I hereby certify that I caused copies of the foregoing pleadings: (1) MOTION FOR AN ORDER COMPELLING DISCOVERY, (2) MEMORANDUM OF LAW: in support of Motion to Compel Discovery, to be *hand-delivered* to counsel for the defendants in the instant case, and that service was made on December 23, 1987.

by  _____

David L. Grindstaff, #4043
Attorney for Plaintiffs
395 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 363-1370

de la Hoya
12-28-87
4:30

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

ALBERT JOHN AND ANGELA	:	Civil No. C86-9250
BUTTERFIELD, as guardians and	:	
parents of and on behalf of	:	
TIFFANY RUTH BUTTERFIELD,	:	<u>MEMORANDUM OF LAW</u> : in support
	:	
Plaintiffs,	:	of <u>MOTION FOR AN ORDER</u>
	:	
vs.	:	<u>COMPELLING DISCOVERY</u>
	:	
DAVID OKUBO, THOMAS NICHOL,	:	
and HOLY CROSS JORDAN VALLEY	:	
HOSPITAL, and JOHN DOES I-V.	:	
	:	
Defendants.	:	Honorable Richard Moffat

COMES NOW the plaintiff's in the above action, by and through their counsel, and hereby submit this MEMORANDUM OF LAW: in support of MOTION FOR AN ORDER COMPELLING DISCOVERY. And state the following:

I. FACTS-ARGUMENTS

1. That defendant Holy Cross Jordan Valley Hospital has failed to answer Interrogatories in a satisfactory or adequate manner, having filed answers which are both evasive and incomplete, to wit:

Interrogatory 1: What is your full name, corporate name, and address.

Answer: Holy Cross Jordan Valley Hospital is a wholly owned subsidiary of Holy Cross Health Systems.

Factual Inaccuracies: This answer does not determine if the association which is known as Holy Cross Jordan Valley Hospital is in fact a corporate body, and what if any is the Corporation's name. Holy Cross Health Systems is not a corporate body or d.b.a. thereof, but is only a Trademark registered in Indiana on February 14, 1986. However a process agent is registered with the Utah Corporate Information at: [Registered Process Agent], 3606 E. Jefferson Blvd., South Bend, Indiana. The response of the named defendant as contained in the Answer should be clearly stricken by the court pursuant to the applicable provisions contained within Rule 37(a) R.C.P., U.C.A. which mandates that such answers be treated as a failure to answer.

Interrogatory 2: What is your job function and any specific duties you perform?

ANSWER: Defendant objects to this Interrogatory as overly broad, vague and nonsensical.

Factual Inaccuracies: This Answer should be stricken as evasive and incomplete. The subject matter does not transcend the specific parameters of the subject material inquired about therein. This is apparently not the usual tactical good-faith answer, or deferment of answer that has come to be relied upon through experience of wise counsel. Further Objections, as well as Answers must be filed within the thirty (30) day time limit as contained in Rule 33 R.C.P. in order to be acceptably valid, as such, assuming that no motion for a protective order has been made

through a timely application. Defendants, individually and collectively in the instant case have not filed their discovery responses within the statutorily mandated time limits (: Thirty days, in this instance), neither have they complied with the additional time allowed by this court, thereby invalidating their objections, and each of them, and should be further treated as a failure to Answer. Failing to answer an interrogatory in an actual good faith effort to fairly meet the substance of the subject matter, may not be excused on the ground that questions are generally arbitrarily found to be objectionable, unless the answering party timely files his objections, to each specific request contained within the Interrogatory. Spilotro v. United States, [CA7, 1973] 732 USTC ¶ 16115. This Interrogatory #2, is neither irrelevant, overbroad in general scope, or improper: the acceptable grounds for the filing of a motion for a protective order, not an unspecified objection, waived by an untimely filing. Re U.S. Financial Secur. Litigation, [S.D., Cal. 1975] 74 FRD 497. Overbreadth Fed Proc, L.Ed. § 26:194 at 232. In relevant part states the following criteria to be used in a determination of "Overbreadth". "Objections to interrogatories will be sustained where the court determines that they are too broad, general, or all inclusive. (All emphasis added herein, supra and infra.) An interrogatory is objectionable where it goes far beyond the transactions at issue in the case and embraces transactions with strangers to the action. Bullard v. Universal Millwork Corp., [D.C.N.Y. 1960] 25 FRD 342. On the other hand, it has been stated that interrogatories should not be held to be overbroad unless,

under the circumstances of a particular case, the court is satisfied that the administration of justice will in some way be impeded by them. The court must balance the burden on the interrogated party against the benefit which having the information will provide to the interrogating party. Flour Mills of America, Inc. v. Pace, [E.D. Okla., 1977] 75 FRD 676. Two noted commentators, Jack H. Friedenthal, and Arthur R. Miller, the co-authors of SUM AND SUBSTANCE OF CIVIL PROCEDURE, (1982) have pointed out that an attorney's interrogatories are likely to be found objectionable on the ground of overbreadth where the attorney (1) phrases his interrogatories in the language of the Civil Procedural Rules; or (2) fails to restrict a request for information to a reasonable and relevant time period.

There is authority which states that an interrogatory which is found to be vague, or somewhat vague and general is not itself justification for a refusal to answer, at least where requiring an answer would not be burdensome. Wing v. Challenge Machinery Co., [D.C. Ill. 1959] 23 FRD 669. Objections to interrogatories when timely filed will be sustained where they are so ambiguous and so wanting in specificity that they become burdensome and oppressive. Pressley v. Boehlke, [D.C.N.C., 1963] 33 FRD 316. Most specifically where, as in the instant case, plaintiff's counsel has specified in para. 2 p. 1 of the first set of interrogatories to Holy Cross Jordan Valley Hospital, that: "In responding to these interrogatories, furnish all information which is available to you , including information in the possession of your attorneys

or investigators for your attorneys, and not merely information known of your own personal knowledge." And at para. 2, p. 2., which specifies with the requisite specificity that, "If you cannot answer the following interrogatories in full, after exercising due diligence to secure the information to do so, so state, and answer to the extent possible, specifying your inability to answer the remainder, and stating whatever information or knowledge you have concerning the unanswered portions." This specifically determines the manner in which the interrogatory (#2, incl.) and each of them is to be answered in conformance with the Rules of Civil Procedure as contained in statutory authority as per Rules 26(a),(b), 33(a), R.C.P., U.C.A. (1953). It should be apparent to which part of named defendant's Answer to Interrogatory #2., the irrelevant and unapplicable appellation of "nonsensical," would necessary apply. However this is a direct contravention of the legislatively enacted Rules of Civil Procedure which no court may abrogate successfully, by the wrongful application of an abuse of discretion when applied to an essentially ministerial function of the court, resulting in the denial of due process and equal protection, as contained within the Fifth Amendment and as applied to the states through the Fourteenth Amendment to the Constitution of the United States, and provisionally applied through Article One, section 3. of the Utah State Constitution, and as also found in Article One, Sections: 7, 11, 27., as the federal courts of general jurisdiction reserve the right to remove an action to federal court pursuant to Rule 81(c),

F.R.C.P., and § 1441 et seq, 28 U.S.C., when necessary to correct a prejudicial and biased denial of Constitutional guidelines which is detrimental to the effective administration of the business of the court, as specified by the Utah Judicial Conduct Commission.

Plaintiffs include the applicable foregoing authorities and contingent discovery procedures as determined by Constitutional, Legislatively and Judically created applications of Common Law, with citations legion. (Specific Common Law cites omitted herein, as not determinative for the purposes of this pleading.) And are included herein both to instruct defendant's counsel, and to have adjudication at this level of application.

Interrogatory 7. (a) Which of the above dates was defendant David Okubo on duty as your employee, and what specific hours did he work on each of the named days? (b) Which of the above dates was defendant Thomas Nichol on duty as your employee, and what specific hours did he work on each of the named days?

Answer: There are no such employees of this answering defendant.

Factual Inaccuracies: This answer, while partially accurate, fails to include the requested time periods that they worked as applicable in the instant case, and therefore is incomplete and treated as a failure to Answer pursuant to the sanctions of Rule 37(a) R.C.P., U.C.A. (1953)

Interrogatory 8: Did you have any contact with the deceased Tiffany Ruth Butterfield on any of the dates above listed in 3.

through 6.?

Answer: Yes. Tiffany was seen in the Emergency Room on July 4, 1984 and August 16, 1984.

Factual Inaccuracies: This Answer is also incomplete and evasive in that there is only a statement which says the deceased plaintiff was seen twice in the Emergency Room, and does not include whether or not there was any other contact through regular, or alternate entry as would logically fall within the requested, "...any contact..." contained in Interrogatory #8. Also the degree of incompleteness of this Answer emerges as there is no additional denial of other contact, and must be treated as a failure to Answer pursuant to the provisions of Rule 37(a), R.C.P., U.C.A. (1953).

Interrogatory 9: If yes, state specifically and in detail, as accurately as your employees can remember, the exact sequence of events that occurred subsequent to the initial encounter or contact with the deceased Tiffany Ruth Butterfield on each of the days above mentioned in 3. through 6.

Answer: This defendant believes an adequate response may be found in the patient's medical records and directs plaintiffs' attention there, according to Rule 33(c) of the Utah Rules of Civil Procedure.

The provisions of Rule 33(c), R.C.P., U.C.A.: Option to Produce Business Records. Wherein a closer reading of this subsection will clearly show that there is a valid option concerning the answering of an Interrogatory which can be derived or ascertained from the business records of the party,...

when the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served. Plainly the burden of producing hospital records by either the defendant hospital, is not equal to the burden occasioned by plaintiff, in the instant action, based on the quality of Answers within this Memorandum of Law, as pertaining to the instant case. Alternatively it is apparent that this instant action in support of a MOTION FOR AN ORDER TO COMPEL DISCOVERY, which also contains an included Motion for the production of documents pursuant to Rule 34, R.C.P., U.C.A., wherein the same defendant has also failed to permit or produce documents, that are specifically relevantly listed as: (2) Medical records of the deceased plaintiff Tiffany Ruth Butterfield, including any photographs and all relevant examinations. These facts would suggest that even when properly requested efforts to discover relevant facts to enable this court to adequately adjudicate the genuine issues of material fact of this instant case they are blatantly met with obstructionist tactics, at best, and for a significant part by evasive attempts to conceal the facts of this case, from discovery of the complete facts as contained within the Answers, which voids them as valid and applicable Answers, and must be treated as a failure to Answer as per Rule 37(a) R.C.P., U.C.A., as well for the untimely objections which bars them as alternates to Answers, as per SPILOTRO (Supra at p. 3.) This sub-tactical handling of discovery by counsel for Holy Cross Jordan Valley Hospital, clearly shows the gross imbalance and burden of production, which invalidates the inherent premise upon

which the provisions of Rule 33(c), R.C.P. are intrinsically based concerning the unavailable "option." This Answer is also evasive and incomplete and based on an incorrect perception and/or reading of the statute, which has been accurately paraphrased by plaintiff's counsel herein. (All emphasis added.)

Interrogatory 10: Was the deceased Tiffany Ruth Butterfield examined by any of your employees on the above named dates, 3. through 6.?

Answer: See answer to preceding (sic) Interrogatory.

Factual Inaccuracies: This assumed Answer is based on the mis-reading or perhaps mis-perception of the content of Rule 33(c) R.C.P., U.C.A., as described in Interrogatory, Answer, and Factual Inaccuracies as described in Interrogatory #9. above, and is properly treated as a failure to Answer for the same evasive and incomplete content of the Answer.

Interrogatory 11: If yes, were other persons involved in the examinations, or witnesses thereto?

Answer: The Emergency Room staff scheduled at Holy Cross Jordan Valley Hospital on the two dates for which there is documentation Tiffany was brought to the hospital include:

July 4, 1984:	3-11	Patty Conder, R.N.
	3-11	Linda Aldrich, R.N.
	11-7	Janice Peummer, R.N.
August 16, 1984:	3-11	Niel Wilcox, R.N.
	3-11	Jean Gardner, R.N.
	11-7	Patty Conder, R.N.

Factual Inaccuracies: This assumed Answer is partially incomplete and evasive when omitting the significant, "who," and

fails to list all requested relevant information asked about examinations, and produces an incomplete Answer which lists only the Emergency Room staff, that may or may have been scheduled. This Answer properly should be treated as a failure to Answer as per the sanctions contained in Rule 37(a) R.C.P., U.C.A. (1953).

Interrogatory 17: Do you, your attorneys, or any person employed by you or your attorneys, have possession or know of the existence of any books, records, reports made in the ordinary course of business, or other printed or documentary material or photographs, drawings, or documents, or other tangible objects that are relevant to any of the conduct described in these interrogatories?

Answer: See Answer to Interrogatory No. 16.

Factual Inaccuracies: This assumed Answer relies on the Answer to Interrogatory #16., which incorrectly also names medical records, which the named defendant has refused to produce. (See: Factual Inaccuracies: Interrogatory 9. (Supra at p. 7.) This assumed Answer is both incomplete, and blatantly evasive, when viewed in the overall context of the related Answers to Interrogatories, and as such should properly be treated as a failure to Answer pursuant to the provisions of Rule 37(a), R.C.P., U.C.A. (1953).

Interrogatory 20: State the names and current addresses of all physicians, surgeons, nurses, physical therapists or other employees of Holy Cross Jordan Valley Hospital, who provided any treatment or examination of the deceased Tiffany Ruth Butterfield

during the period from birth until her death.

(a) The name and current addresses of each practitioner.

(b) The dates of all such examinations or treatments.

(c) The name and current address of the person in charge of each examination or treatment administered.

Answer See Answers to Interrogatories No. 9, 11, and 16.

Factual Inaccuracies: These relied upon answers are essentially based upon the wrongful interpretation of the "option" contained within Rule 33(c), R.C.P., U.C.A., and as such share the identical fatal flaws. And being a collateral and organized attempt to circumvent the plain and simple discovery Rules of Civil Procedure, the epitomize the deception attempted through their wrongful assertion, in lieu of valid Answers as statutorily mandated, and are therefor properly treated as failure to Answer, as per the statutory provisions of Rule 37(a), R.C.P., U.C.A., and as such surely indicate the valid culpability and contingent liability of defendant herein named.

Interrogatory 21: State the names and addresses of all persons known to the defendant and defendant's counsel, agents, assigns, or representatives to have personally witnessed any of the symptoms of the deceased at any time.

(a) State the date the symptoms were witnessed.

(b) State whether records were made concerning these symptoms.

Answer: See Answer to Interrogatory No. 20.

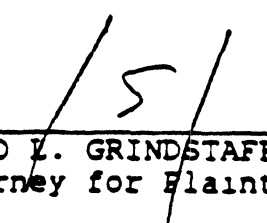
Factual Inaccuracies: This assumed Answer fails for the same reason as the Answer to Interrogatory #20.

Interrogatories 23, and 26: The assumed Answers are clearly arbitrary and unauthorized failure to Answer pursuant to Rule 37(a), R.C.P., U.C.A., as: (23) an arbitrary and capricious determination that the material is "not applicable," sans any specific reasoning, as required by the Rules of Civil Procedure; and (26) An apparent belief that this interrogatory can be avoided, without a request for deferment of Answer at a later time, as provided within the Rules of Civil Procedure concerning the Rules of discovery.

II. CONCLUSION

Defendant's counsel has consistently filed late and therefore inapplicable objections, although the Answers may be allowed through judicial discretion. These type of Answers cannot be properly termed discovery, and this court in allowing latitude therein, while conversely indicating that the discovery time should not be enlarged, if pursued in light of this additional information possibly allow the plaintiffs due process of law, both administrative and procedural, as well as equal protection under the law, concerning this action for medical malpractice which resulted in untimely death, which focuses the "Life" interest, jealously guarded as foremost of our Constitutional guarantees. Respectfully submitted.

DATED AND SIGNED: December 21, 1987.



DAVID L. GRINDSTAFF,
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

"I hereby certify that I cause copies of the foregoing MEMORANDUM OF LAW: in support of MOTION FOR AN ORDER COMPELLING DISCOVERY, to be *hand-delivered* to opposing counsel, at:

David W. Slagle, Esq.
SNOW, CHRISTENSEN & MARTINEAU
Eleventh Floor, Newhouse Bldg.
10 Exchange Place
Salt Lake City, Utah 84111

Gary D. Stott, Esq.
RICHARDS, BRANDT, MILLER & NELSON
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110

R. Scott Williams, Esq.
STRONG & HANNI
Sixth Floor, Boston Bldg.
9 Exchange Place
Salt Lake City, Utah 84111

And that service upon the defendant's counsel was made on this ~~22nd~~ 28th Day of December, 1987.

28

by /5/
DAVID GRINDSTAFF LAW OFFICE

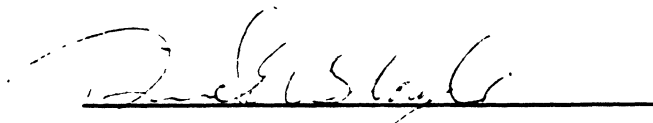
MAILING CERTIFICATE

I hereby certify that ^{four}~~two~~ true and correct copies of the foregoing were mailed, first class, postage prepaid, on this 14th day of October, 1988, to the following counsel of record:

David L. Grindstaff, Esq.
395 South 600 East
Salt Lake City, Utah 84102
Attorney for plaintiffs/appellants

R. Scott Williams, Esq.
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Attorneys for Respondent David Okubo

Gary D. Stott, Esq.
RICHARDS, BRANDT, MILLER & NELSON
50 South Main Street #700
Salt Lake City, Utah 84110
Attorneys for Respondent Nickol

A handwritten signature, likely of David L. Grindstaff, is written over a horizontal line.